No. 89 - 1408

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

RANDALL TERRY, OPERATION RESCUE, et al.,

Petitioners,

- v. -

NEW YORK STATE NATIONAL ORGANIZATION FOR WOMEN, et al.,

Respondents,

CITY OF NEW YORK,

Respondent-Intervenor,

UNITED STATES OF AMERICA,

Respondent-Judgment Creditor.

RESPONDENT-INTERVENOR'S BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the City of New York may properly prosecute a state law claim for public nuisance?

2. Whether the contempt sanction of $19,141, payable to the City of New York as compensation for excess costs incurred by petitioners' failure to comply with the district court's temporary restraining order, was civil or criminal in nature?

LIST OF PARTIES

Respondent-intervenor accepts the list of parties included by petitioners at page iii of their Petition for a Writ of Certiorari.

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STATEMENT OF THE CASE

Petitioners seek review of a judgment of the United States Court of Appeals for the

Second Circuit, which, with respect to the respondent-intervenor City of New York ("City"), upheld the validity of a permanent injunction issued by the United States District Court for the Southern District of New York (A47-51);[1] approved the assessment against petitioners of a contempt sanction of $19,141, payable to the City, representing the additional costs incurred by the municipality by reason of petitioners' failure to comply with the prior notice provisions of a previous temporary restraining order (A26); and similarly approved discovery sanctions against petitioners and their attorneys (A36).

Both the preliminary and permanent injunctions in question prohibited petitioners, inter alia, from preventing "ingress into or egress from" any medical

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[1] Numbers in parentheses prefaced by the letter "A" refer to pages in the Appendix submitted by petitioners with their Petition for a Writ of Certiorari.

facility at which abortions are performed in the City of New York, as well as in three surrounding counties (A54, A144-145). The orders further specified that petitioners would be liable for any "excess costs incurred as a result of [petitioners'] failure to provide the City with [twelve hours] advance notice of the location of their demonstration" (A55, A146), and stated that any failure to comply with the other terms of the injunction would subject petitioners to civil damages of $25,000 per day (A54, A145).[2] Both injunctive orders specifically

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[2] The original temporary restraining order, dated May 5, 1988, directed that the $25,000 be paid to the Court, "to be disbursed by further order of this Court" (A55). The permanent injunction, issued January 10, 1989, repeated this instruction but directed that the $25,000 be doubled for each successive violation (A145). When respondents and respondent-intervenor sought contempt sanctions for violation of the May 5, 1988 order, the District Court ordered the $25,000 per day paid to

(Footnote Continued)

stated that they were not to be construed to limit petitioner's legitimate First Amendment rights (A54, A145).

The City entered this case on May 3, 1988, as a plaintiff-intervenor in New York State Supreme Court, where this suit was originally commenced in April 1988 by respondent NOW et al. (for purposes of this brief, the collective respondents will be referred to hereafter as "respondent NOW"). Intervention on a public nuisance theory was sought by the City when it became clear that police efforts could not assure access by the public to the medical facilities blockaded by petitioners. Within hours of the time when the City was granted intervenor status on oral motion in state court, petitioners

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(Footnote Continued)
respondent National Organization for Women ("NOW") (A102-105). The Circuit Court upheld the amount of the sanction but ordered it paid to the Court rather than to respondent NOW.

removed the case to federal court, where the May 5, 1988 temporary restraining order challenged by petitioners was issued.

The City thereafter formally sought intervenor status in the district court, filing a complaint setting forth a state-law public nuisance claim (A170-175). Describing itself as suing "on behalf of itself and the people of the City" pursuant to section 394(c) of the New York City Charter, the City alleged that defendants were "endangering the public security, safety, and welfare of the City of New York and its residents, especially those women seeking to obtain abortions or other family planning or medical services at facilities where abortions are performed" (A171). The City requested the same declarative and injunctive relief sought by the original plaintiffs, plus an award of "damages to the City of New York commensurate with the amount expended by the City because of defendants' failure to

notify the City in advance of the site of their demonstration" (A174-175). The motion to intervene was granted nunc pro tunc by order entered July 19, 1988.

When petitioners defied the district court's May 5, 1988 temporary restraining order by blockading a medical facility on East 85th Street in Manhattan on May 6, 1988 without giving the required twelve-hour notice to the police, in addition to blocking access to a facility in Hicksville, Long Island, for three hours on the previous day, the City joined with respondent NOW in seeking contempt sanctions. The joint motion was granted by order entered October 27, 1988 (A102). As directed by the order, the City served and filed a statement documenting that it had incurred $19,141 in excess costs due to the necessity of keeping police officers on call in all five boroughs because petitioners had not provided advance information on the location

of their previously announced May 6, 1988 demonstration (A106). Petitioners did not contest the reasonableness of the claimed costs, and they were approved by the district court on December 2, 1988 (A106). Judgment was entered December 9, 1988.

In addition to seeking contempt sanctions, the City joined with respondent NOW in a motion seeking discovery sanctions which resulted in entry of a judgment of $16,142.75 against petitioners and their counsel (A76-77). It also joined with respondent NOW, on a public nuisance theory, in moving for the preliminary injunctive relief granted by the district court's October 27, 1988 order, which extended the terms of the May 5, 1988 temporary restraining order to activities threatened for Halloween 1988 (A109-114); and in moving for summary judgment and the permanent injunctive relief granted by the court's January 10, 1989 order (A115-144).

REASONS WHY THE WRIT SHOULD BE DENIED

POINT I

THE CITY OF NEW YORK'S PUBLIC NUISANCE CLAIM PROVIDES AN INDEPENDENT STATE LAW GROUND JUSTIFYING ISSUANCE OF THE CHALLENGED INJUNCTION, AND PETITIONERS' ATTACK ON THE CITY'S STANDING TO PRESS THAT CLAIM IS WITHOUT MERIT.

(1)

As respondent NOW notes in Point I of its brief in opposition to issuance of the requested writ, petitioners have declined to inform this Court that the challenged judgment rests not only on 42 U.S.C. § 1985(3), but on the state law grounds of trespass, asserted by respondent NOW et al., and of public nuisance, the claim pressed by the respondent-intervenor City of New York. As respondent NOW emphasizes in arguments that will not be repeated here, this Court need not reach the 42 U.S.C. § 1985(3) questions posed by petitioners because these alternative state

law grounds fully support the judgment. See, Respondents' Brief in Opposition at pp. 11-16, and cases cited therein.

Significantly, petitioners do not challenge the substantive rulings of the courts below upholding the viability of the City's state law public nuisance claim. Indeed, they could not. New York State's highest court has defined a public nuisance, inter alia, as conduct which interferes with the exercise of rights common to all in a manner such as to endanger or injure the property or health of a considerable number of persons. Copart Industries, Inc. v. Consolidated Edison Co., 41 NY2d 564, 568, 362 NE2d 968 (1977). Here, the City intervened to protect the right of the citizens of the City of New York to obtain medical services, a right with which petitioners concededly interfered by their admitted efforts not just to protest against, but to physically block access to health-care

facilities offering a wide range of medical, prenatal, and counseling services, in addition to the abortion services of which petitioners disapprove.

Petitioners' only attack on the rulings with respect to the City's public nuisance claim is couched in terms of a challenge to the City's standing. Inasmuch as it was petitioners who removed the case from state to federal court, this argument can only be termed disingenuous. Under state law, it is well-established that a municipality may properly prosecute a cause of action for public nuisance. New York Trap Rock Corp. v. Town of Clarkstown, 299 NY 77, 83, 65 NE2d 873 (1949); Town of Orangetown v. Gorsuch, 544 F.Supp. 105, 109 (S.D.N.Y., 1982), aff'd, 718 F.2d 29 (2nd Cir., 1983), cert. denied, 465 U.S. 1099 (1984). In order to obtain relief, there is no need for the State or locality prosecuting a nuisance action to prove

actual, as opposed to threatened harm, State of New York v. Shore Realty Corp., 759 F.2d 1032, 1051 (2nd Cir., 1985), and resort to a nuisance action is appropriate where a defendant who intentionally endangers the public health has not been deterred by criminal prosecution. People ex rel. Bennett v. Laman, 277 NY 368, 14 NE2d 439 (1938).

Finally, although petitioners do not even attempt to explain how their removal of this case to federal court somehow destroyed the City's ability to prosecute a state law claim otherwise viable in state court, it is worth noting that the City has nevertheless met the traditional tests required to establish standing. Petitioners' own literature describing New York City as a future target of their activities, as well as evidence of the magnitude of the arrests, the degree of disruption, and the strain on the personnel and financial resources of the municipality engendered by the demonstrations on May 2

and May 6, 1988, establish the necessary "concrete injury or threat of injury" to the City itself. Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979).

(2)

In addition to questioning one of the state-law bases on which the challenged injunction was issued by attacking the City's standing, petitioners also assert that its terms violate their First Amendment rights. More particularly, petitioners appear to argue that First Amendment protections should be extended to their efforts to prevent patients from entering targeted medical facilities. Inasmuch as petitioners themselves recognize that this Court has already considered and rejected similar propositions on several occasions (Petitioner's Brief at p. 20), objection to the challenged injunctive relief on this ground cannot serve as the basis for issuance of the requested writ. See, Cameron v. Johnson,

390 U.S. 611, 617 (1968); Adderly v. Florida, 385 U.S. 39, 47-48 (1966); Cox v. Louisiana, 379 U.S. 536, 554-555 (1965).

POINT II

THE IMPOSITION OF A COERCIVE FINE OF $19,141 FOR CIVIL CONTEMPT, PAYABLE TO THE CITY OF NEW YORK AS RECOMPENSE FOR EXCESS COSTS INCURRED BY REASON OF PETITIONERS' FAILURE TO COMPLY WITH THE PRIOR-NOTICE PROVISIONS OF THE DISTRICT COURT'S MAY 5, 1988 TEMPORARY RESTRAINING ORDER, WAS ENTIRELY PROPER.

In addition to providing for a $25,000 per day fine for any violation of its order restraining petitioners from blocking access to targeted medical facilities, the district court's May 5, 1988 order also provided that petitioners would be liable for any excess costs incurred by the City of New York by reason of petitioners' failure to provide the police with twelve hours advance notice of the location of any demonstration. Petitioners' attempt to characterize the latter

provision as a criminal rather than a civil contempt sanction, and so avoid payment of the $19, 141 in itemized costs ordered by the district court, is completely without merit.[3]

This sanction fits precisely within the classic model of a civil contempt sanction, a sanction designed both to coerce future compliance with a court's order and to compensate a complainant for noncompliance. See, United States v. United Mine Workers of America, 330 U.S. 258, 303-304 (1947); Perfect Fit Industries v. Acme Quiliting Co., 673 F.2d 53, 57 (2nd Cir., 1982), cert. denied, 459 U.S. 832 (1982). Furthermore, it is more than disingenuous for petitioners

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[3] The costs in question were occasioned by the need to maintain police personnel on call in all five boroughs of the City in preparation for handling the demonstration anticipated for May 6, 1988. As part of their tactics, petitioners refuse to disclose in advance the precise location of demonstrations.

to insist that they were improperly denied due process before imposition of the contempt sanction when they stipulated to the facts that established the act of contempt; refused, when requested, to supply any evidence establishing their claimed poverty; and did not contest, although given the opportunity, the itemized list of excess expenses supplied by the City of New York for approval by the Court.[4]

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[4] Admissions by petitioner that they had blocked access to health-care facilities, and intended to do so in the future, similarly render without merit petitioners' claim that summary judgment should not have been granted. With respect to the final issue involving the respondent-intervenor City of New York for which petitioners seek a writ of certiorari, the City agrees with respondent NOW that there is absolutely no support in the case law for petitioners' claim that imposition of discovery sanctions was improper.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

May 1, 1990

Respectfully submitted,

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